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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

REID JILEK, an individual, Plaintiff, v. EPITOME PHARMACEUTICALS LIMITED, a Nova Scotia limited corporation, Defendant.	Case No. 08 CV 0658 IEG WMc **REID JILEK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISQUALIFY DEFENDANT'S ATTORNEYS** Date: July 14, 2008 Time: 10:30 a.m. Courtroom: #1, 4th Floor Hon. Irma Gonzalez Trial: None Set

Plaintiff REID JILEK presents the following memorandum of points and authorities in support of his motion to disqualify Defendant's attorneys.

BACKGROUND

In 1977 JILEK signed a contract (the "Contract") prepared by Defendant EPITOME. It is attached to JILEK's complaint as Exhibit A and is attached as Exhibit A to the JILEK declaration filed with this motion. Some time in 1997, JILEK discovered that EPITOME had secured a licensing partner. Under the Contract, EPITOME was supposed to inform any of its potential partners about JILEK'S entitlement to 5% of EPITOME royalties.

EPITOME refused to tell JILEK the identity of its new licensing partner. JILEK felt the only way to discover the new partner's identity was to send letters to various European pharmaceutical companies and inquire whether they had agreements with EPITOME.

At this same time, JILEK was introduced to attorney Matt Kirmayer through two different acquaintances -- Alan Glick and Harris Brotman. JILEK met with Kirmayer and one of Kirmayer's associates at the Gray Cary offices in San Diego. They reviewed and discussed his Contract; he requested and received legal advice regarding his Contract. He also showed them the letter he proposed to send to the German pharmaceutical companies. He sought and received legal advice from them regarding the language of the proposed letter. (The proposed letter is attached to the JILEK declaration as Exhibit C). He received Kirmayer's business card at the meeting (Ex. B to JILEK declaration). JILEK ultimately did not retain Kirmayer on this matter but used another law firm.

Kirmayer's law firm (Gray Cary Ware & Freidenrich LLP) was subsequently merged or acquired by EPITOME's current counsel DLA Piper. Although Kirmayer is not currently employed by DLA Piper, JILEK has no assurances that his confidences were not discussed by other attorneys who remain at DLA Piper. Shortly after DLA Piper appeared in this matter, JILEK'S counsel told them of the conflict and requested that they voluntarily disqualify themselves from this case; although they gave no reason for doing so, they refused.

LEGAL ANALYSIS

1. Possession of Confidential Information is Conclusively Presumed When the Previous Representation Bears A Substantial Relationship to Current Representation

Rule 3-310(E) of the California Rules of Professional Conduct states in pertinent part:

> A member shall not, without the informed consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Business & Professions Code § 6068(e) states in pertinent part:

> It is the duty of an attorney to do all of the following:
> . . .
>
> (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

It is conclusively presumed that counsel possesses confidential information when there exists a "substantial relationship" between the current and former representation and confidential information material to the current dispute would normally have been imparted to counsel. *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal. App. 3d 752, 760; *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 568-569; *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.

In the recent case of *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213-1214, the defendants (Fergusons) appealed an order granting plaintiff's motion to disqualify defendants' attorney, Wideman. Plaintiff had previously consulted with Wideman about forming a partnership and entering into a commercial lease to establish a new restaurant. The present litigation arose from that business venture. In affirming the order, the Court of Appeal rejected each of Fergusons' arguments. Fergusons contended there was no substantial relationship between Wideman's representation of Knight and the current case which concerned different issues. The court rejected that argument stating that the substantial relationship test was broad and not limited to the "strict facts, claims, and issues involved in a particular action. *Id.* at 1214. "[A] 'substantial relationship' exists whenever the 'subjects' of the prior and the current representations are linked in some rational manner. That is the case here." *Id.* at 1214.

The Fergusons also claimed that there was no proof that Wideman obtained confidential information. The court indicated that the "aggrieved client" need only satisfy a "low threshold of proof" and does not have to prove the attorney actually received confidential information. "Where a substantial relationship is shown between the prior representation and the present case, (1) it is presumed the attorney received confidential information [citations omitted] and (2) the attorney's disqualification 'is mandatory'." [citations omitted] *Id.* at 1215.

In the matter before this Court, we not only have a "substantial relationship" but we have the exact same matter upon which JILEK sought and received legal advice -- his contract with EPITOME. This litigation ensued when EPITOME, after years of indicating it would honor its contract with JILEK, declared its intention to repudiate the contract. JILEK and attorney Kirmayer

and his associate went over the terms of this same contract; JILEK sought and received their advice about the enforceability of this same contract. Now this same contract is being repudiated and the repudiation is being defended by the successor law firm that gave JILEK advice on its enforceability. DLA Piper should be disqualified.

2. Prior Representation Does Not Require Formal Attorney-Client Relationship

JILEK readily admits that he hired another law firm to represent him in further negotiations with EPITOME after his consultation with Kirmayer, and that he never formally retained Kirmayer. The fact that Kirmayer was not formally retained, however, is irrelevant. The primary consideration on a motion to disqualify is the protection of the moving party's reasonable expectation of confidentiality. In *Pound v. DeMera* (2005) 135 Cal.App.4th 70, 76-79, defendants interviewed attorney Bradley as possible counsel to represent them in litigation with plaintiffs. In the course of that interview Bradley received confidential information from defendants. Defendants ultimately hired someone else as their attorney in the dispute. Three years later counsel for plaintiffs associated Bradley into the case as co-counsel. This triggered the disqualification of Bradley and plaintiffs' original counsel even though there was no evidence co-counsel shared defendants' confidential information with plaintiffs' original attorney. As to the disqualification of plaintiffs' original attorney, the Court of Appeal stated that although this was a case of first impression it had no "conceptual difficulties" resolving it. The court's reasoning was as follows:

> In each situation it is the attorney's duties of loyalty and confidentiality to his client that are implicated. 'Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. [Citation.] The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. [Citation.]" *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th at pp. 1146-1147.
>
> State Bar Rules of Professional Conduct, rule 3-310 is designed to protect a client's confidences. This rule prohibits attorneys from accepting employment adverse to a client or former client if by reason of the representation the attorney obtained confidential information material to the employment, unless the former client provides an

> informed written consent. (Rules Prof. Conduct, rule 3-310(E).) The purpose of the rule is to protect the confidential relationship which exists between attorney and client, a relationship which continues after the formal relationship ends. [Citation.] The fiduciary nature of that relationship requires the application of strict standards. [Citation.]' *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th at p.113.
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> Disqualification is required to protect the client's confidences. Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal. 4th at p. 1146.

The fact that JILEK did not ultimately retain Kirmayer is of no importance. He made disclosures to them which he expected to remain confidential on the matter that is now the subject of this lawsuit. Because Kirmayer and his associate were with Gray, Carey, Ware & Freidenrich at the time of the consultation, and Gray, Carey has now become DLA Piper, the entire law firm must be disqualified as EPITOME's attorneys in this matter.

3. <u>The Entire Law Firm Must Be Disqualified Because a Member of the Firm Previously Represented the Moving Party in this Current Matter.</u>

JILEK has no facts as to how long Kirmayer stayed with Gray, Cary, Ware & Freidenrich, LLP, or whether his associate may still by employed by DLA Piper. He does know, however, that he disclosed information to them, which information he expected to remain confidential, on exactly the same contract which is now the subject of this litigation.

Although Kirmayer has departed from his former firm, confidences are conclusively presumed to have been shared by the departed lawyer with members of the former firm. *Elan Transdermal Ltd. V. Cygnus Therapeutic Systems* 809 F: Supp. 1383, 1389-1391(N.D. CA 1992); *Asyst Technologies, Inc. v. Empak, Inc.* 962 F. Supp. 1241, 1243 (N.D. CA 1997).

In *Asyst Technologies,* the defendant's law firm argued that the attorney that created the conflict of interest was no longer employed by the firm and therefore the plaintiff's disqualification

motion was moot. The court replied to that argument as follows: "I fail to see how a tainted firm is cleansed by the departure of one of the attorneys who created the taint." Id. at fn. 3 1243.

There is no way for JILEK to know who was privy to the information he shared with Kirmayer or his associate. He need not prove actual misuse of confidential information because requiring such proof would by itself require the disclosure of the confidential information. *Atasi Corp. v .Seagate Technology* 847 F. 2d 826, 829 (Fed. Cir. 1988).

In *I-Enterprise Company LLC v. Draper Fisher Jurvetson Management Company V,LLC.* (2005 U.S. Dist. LEXIS 45190) the defendant sought to disqualify DLA Piper based on the fact that attorney Young had formerly billed one-half hour at his prior firm in a matter substantially related to the current litigation. Despite the fact that Young declared he had "no recollection of any matters relating [to] the captioned litigation" and "no recollection of being involved in any way in any matter relating to the plaintiff identified in the caption," the court disqualified the entire new firm of DLA Piper. The same result is compelled in this matter. .

This litigation is in its infancy. The issue of disqualification has been brought to Defendant's attention as soon as it was discovered and is not brought in order to seek any type of advantage. JILEK desires to move ahead with this litigation and was hopeful that DLA Piper would voluntarily recuse itself without the necessity of a formal motion. In refusing to voluntarily disqualify itself, DLA Piper gave no factual or legal reasons for its failure to do so, necessitating this motion.

CONCLUSION

On the facts of this matter there is no dispute that not only is there a "substantial relationship" between the past and present matter but that it is the exact same matter. The possession of confidential information by DLA Piper is presumed. DLA Piper should be disqualified from representing Defendant EPITOME in this matter.

Dated: May 28, 2008

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By: Mary Best

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